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IN THE

Supreme Court of the United States

October Term, 1970
No. 1296

EL RANCO, INC., EL RANCO HOTEL OPERATING CO., and BELDON R. KATLEMAN,

Petitioners,

vs.

THE FIRST NATIONAL BANK OF NEVADA, as Administrator of the Estate of RENE DARDY,

Respondent.

On Petition for Writ of Certiorari.

BRIEF FOR RESPONDENT IN OPPOSITION.

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To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

Statement.

The following pertinent facts have been omitted from the petition for writ of certiorari, as corrected by the Supplement to Petition for Writ of Certiorari:

Rule 1(d), Local Rules of the United States District Court for the District of Nevada, at all times herein material, stated:

> "(d) *Non-Resident Attorneys*
>
> Only a member of the bar of this court may enter appearances for a party, sign stipulations or receive payment or enter satisfaction of judgment,

decree or order. However any member in good standing of the Bar of any United States court, or of the highest court of any State or of any Territory or Insular possession of the United States, who has been retained to appear in this court, and who is not a resident of this district, or does not maintain an office in this district for the practice of law, may be permitted after application, without previous notice to appear and participate in a particular case. Such applicant shall designate, in his application so to appear, a member of the bar of this court who maintains an office in this district for the practice of law, with whom the court and opposing counsel may readily communicate regarding the conduct of the case. He shall also file with such application the address, telephone number and written consent of such designee. Such permission to appear, granted to a non-resident attorney, being a limited one, no certificate of admission shall be issued by the Clerk. The designee shall personally appear with the non-resident attorney on all matters heard or tried before the court. Original pleadings may be filed by non-resident counsel but time for the filing of any responsive pleading shall not begin to run until the appearance of associated local counsel is filed with the clerk. This rule shall not apply to attorneys representing the United States, its commissions, departments or agencies."

The original motion for relief from judgment, filed on June 24, 1969 by petitioners, contained the following designation of counsel at the top of the pleading on the left side: "Samuel Lionel and Leo K. Gold and Marks, Sherman and London, 302 East Carson Street,

Las Vegas, Nevada 89101, Tel: (702) 385-2188." [R. 2-17].

On October 27, 1969, a formal order denying the motion for relief from judgment was entered on the docket [R. 65]. The docket entry for October 27, 1969 refers to said formal order and adds, "Copy to counsel." [R. 157].

No notice of appeal was filed within the 30 days of the date of the entry of the order, which occurred on October 27, 1969. No motion was filed for an extension of the time for taking an appeal. Instead, petitioners, El Ranco, Inc., El Ranco Hotel Operating Co. and Beldon R. Katleman, caused a duplicate order to be entered on December 31, 1969 [R. 66-67]; and on January 28, 1970 they filed a Notice of Appeal "from that certain Order of the Court dated October 23, 1969, and/or December 31, 1969, denying the motion of defendants for Relief from Judgment." [R. 86].

Meanwhile, respondent on January 7, 1970 moved to vacate the duplicate order entered December 31, 1969 [R. 68-78]; and respondent showed that the Chief Deputy Clerk of the Court below had duly served a copy of the original order entered October 27, 1969 on Nevada counsel for petitioners [R. 75-76] and that a subsequent letter by California counsel for petitioners asked that the District Judge sign an order upon the alleged ground that counsel for the respondent had neglected to prepare an order and "we haven't received a copy." [R. 77]. The petitioners opposed the motion on the ground that a copy of the original order was mailed on October 27, 1969 to Samuel Lionel, Esq. (Nevada counsel for petitioners), but was not received by Marks, Sherman and London and Leo K. Gold (California counsel for petitioners) [R. 80, lines 8-12].

The District Court granted respondent's motion and the Order Vacating Order entered December 31, 1969, Denying Relief from Judgment, was entered on March 9, 1970 [R. 99-101]. The District Court found that the duplicate order entered December 31, 1969, "was requested to reinstate the time to appeal which had expired under the Order entered October 27, 1969, of which adequate due notice had been given" and that the duplicate order was signed because the District Judge had received a letter from one of the counsel for the petitioners, which letter was characterized as follows:

> "Without observing anything *artful* about the letter and accepting it at face value, the undersigned Judge retyped the proposed Order and it was signed and filed in Reno on December 24, 1969, and entered on the docket at Las Vegas on December 31, 1969." [R. 100, lines 20-31]. (Emphasis added).

On April 3, 1970, petitioners, El Ranco, Inc., El Ranco Hotel Operating Co. and Beldon R. Katleman filed a paper which they characterized as a motion for relief from the order entered on the docket in Las Vegas, Nevada, on March 9, 1970; namely, the order vacating order entered December 31, 1969, denying motion for relief from judgment [R. 103-110]. In this paper, petitioners for the first time made accusations against respondent's counsel, because he did not obtain petitioners' approval as to the form of the original order signed by the District Court on October 23, 1969 and entered on October 27, 1969. Thus the petitioners

took the offensive in a situation where they failed to take a timely appeal from an order, of which adequate notice had been given.

The District Court entered an order that the paper filed April 3, 1970, entitled "Notice of Motion and Motion for Relief from Order pursuant to Rule 60-(b)(4)(5)(6); Affidavit and Points and Authorities in Support Thereof," be stricken and stated as follows:

> "The paper is nothing more than a request for reconsideration of the ruling made by the Court on March 6, 1970. The Court has no jurisdiction of it, and if it had jurisdiction of such a repetitive motion, would deny it on the merits." [R. 115-116].

On July 31, 1970 Notice of Appeal was filed, which stated that an appeal was taken "from that certain order of the Court dated June 1, 1970 (and entered July 6, 1970), denying the Motion of Defendants for Relief from Order Pursuant to Rule 60(b)(4)(5)(6)" [R. 117-118].

It was arguable that the characterization of the order in the Notice of Appeal was merely a subterfuge to divert attention from petitioners' real purpose, that is, to correct a previous failure to take a timely appeal from the Order entered October 27, 1969 and an unsuccessful attempt to reinstate the time to appeal by means of the duplicate order entered December 31, 1969, which was vacated.

Respondent, therefore, filed a motion to dismiss the appeal, which was granted by the Court of Appeals.

ARGUMENT.

The problem presented by the petition for writ of certiorari is episodic. It arises from a local rule of the United States District Court for the District of Nevada that all transactions with the District Court would be through local counsel. *Petitioners admitted in the record below that the original order was mailed on October 27, 1969 to Samuel Lionel, Esq. (Nevada counsel for petitioners).* Petitioners added that it was not received by Marks, Sherman and London and Leo K. Gold (California counsel for petitioners). [R. 80, lines 8-12]. Petitioners failed to take a timely appeal within 30 days of the date of the entry of the order, as required by Rule 4(a), Federal Rules of Appellate Procedure.

California counsel corresponded with the District Court in an effort to obtain an additional order which might create a new time for appeal. California counsel ultimatey failed to secure a new time for appeal. He then filed what was essentially a request for reconsideration, which he called a motion for relief from an order; and when the District Court acted, he then filed a notice of appeal from what he called an order denying relief from a judgment [R. 117-118]. The Court of Appeals perceptively dismissed the appeal as frivolous. In sum, petitioners did not file a timely notice of appeal from the original order. Responsible counsel attempted to circumvent this omission. Review on writ of certiorari is unwarranted. *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70 (1955).

Conclusion.

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

MORTON R. GALANE,
Counsel for Respondent.